IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 633 of 1996
with
CRIMINAL MISC. APPLICATION No 119 of 1997
(Suo Motu for enhancement)

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NATUBHAI BABUBHAI

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 633 of 1996
MR DEEPAK M SHAH for Petitioner No. 1
MR KC SHAH, APP for Respondent No. 1
2. Criminal Misc.Application No. 119 of 1997
MR KC SHAH, APP for Petitioner No. 1
MR PRADYUMAN B BHATT for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 04/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal under Section 374 of the Code of Criminal Procedure, 1973, at the instance of the appellant-accused, is directed against the judgment and order dated 31.5.1996 of the learned Additional Sessions Judge, Ahmedabad (Rural) convicting the appellant of the offence punishable under Section 376 IPC and sentencing him to rigorous imprisonment for seven years and also to pay a fine of Rs.1,000/- in default simple imprisonment for three months. When the appeal, preferred by the appellant-convict through jail, came up for preliminary hearing on 6.1.1997, the learned Single Judge passed the following order :-

"The appeal is admitted. A notice for enhancement of sentence is ordered to be issued. Bail is refused."

2. When the appeal reached final hearing today, Mr DM Shah, learned counsel appointed for the appellant states that the appellant has already been released from jail on 25.6.1998 as the appellant was granted remission of 2 years, 4 months and 4 days and that otherwise also the accused who was arrested on 22.10.1997 would have served out the entire sentence of seven years and three months of imprisonment in default of payment of fine by 22.1.2001. Mr Shah has, however, submitted that in view of the stigma of conviction, the appellant is desirous of challenging the conviction.

3. Mr KC Shah, learned Additional Public Prosecutor has opposed the appeal against conviction and has submitted that appropriate orders may be passed on the suo motu notice for enhancement considering that the sentence awarded by the trial Court was inadequate.

4. The appellant was charged for the offence punishable under Section 376 IPC in that on 20.10.1993 at about 5.30 PM, when Gitaben, daughter of Jayantibhai was grazing cattle in the outskirts of village Ranchchoda in Ahmedabad (Rural) district, the accused committed sexual intercourse with her against her will and without her consent. The prosecution case was that Jayantibhai, father of victim Gitaben, was cultivating the field of Laxmanbhai and had taken the crop of bananas on the date of the incident and had gone to Dholka for selling bananas. Madhuben (Jayantibhai's wife and mother of victim Gitaben) and Gitaben had gone to the agricultural

field of Laxmanbhai for collecting cattle feed. At about 5.30 PM in the evening, complainant-Madhuben, mother of the victim, heard Gitaben's shouts "mummy, mummy" and saw her daughter Gitaben lying on the ground and accused-Natubhai Babubhai Bhoi was nude and when Madhuben reached the spot, the accused put on his underwear and ran away. The complainant found that her daughter's private part was bleeding and had become speechless and almost unconscious. The complainant took her daughter to their residence and after the complainant's husband returned from Dholka, the complainant informed him about the incident and they lodged complaint before the Police Sub Inspector of Bavla Police Station. However, the Bavla Police Station informed that the incident had taken place within the territorial jurisdiction of Dholka Police Station. Hence, the investigation was carried out by Dholka Police Station. The Investigating Officer sent Gitaben for medical examination and also got the panchnama of the scene of offence prepared. Both the victim as well as the accused were subjected to medical examination. Thereafter, the accused was arrested and the clothes were also seized and sent for examination to the FSL. The charge-sheet was filed and the accused was committed to the Court of sessions.

5. The accused pleaded not guilty. The prosecution examined victim-Gitaben Jayantibhai at Exh. 9, complainant i.e. her mother Madhuben Jayantibhai at Exh. 10, Dr Chhatrasinh Vajesinh Barad at Exh. 11 (who examined the accused), Dr Harish Gemalbhai Jadav at Exh. 16 (who examined Gitaben). The panch witnesses and the Investigating Officer were also examined. The statement of the accused under Section 313 of the Cr.PC was also recorded containing general denials. The accused did not examine himself as a witness nor did he lead any evidence in defence.

6. After considering the evidence on record and the arguments of the learned counsel for the parties, the learned trial Judge held that Gitaben was born on 26.9.1981 and, therefore, on the date of the incident she was aged 12 years. Gitaben had identified the accused before the Court as the same person who had committed rape on her. The learned Judge held that Gitaben was able to give evidence and there was no reason not to believe the evidence given by her. The learned Judge also considered the medical evidence indicating that Gitaben had suffered injuries inside and around her vagina which were in the nature of abrasions and erosions and that there was bleeding from the vagina, the hymen was broken and there was swelling thereon. After

considering the material on record and the submissions, the learned Sessions Judge convicted the accused for the offence punishable under Section 376 IPC and thereafter heard the accused on the question of sentence. The main plea of the accused on the question of sentence was that he was married and had three children and, therefore, mercy may be shown to him. The learned Judge considered the said plea and held that in the facts and circumstances of the case, there was no justification for awarding lesser sentence than the minimum stipulated in the provisions of Section 376 IPC and accordingly passed the order awarding sentence of seven years rigorous imprisonment and fine of of Rs.1,000/- in default simple imprisonment for three months.

It is the aforesaid judgment and order which is challenged in the present appeal. As stated above, while admitting the appeal, the learned Single Judge had issued notice for enhancement.

7. At the hearing of the appeal, Mr DM Shah, learned counsel appointed for the appellant has made the following submissions :-

(i) There was delay in filing the FIR. The alleged incident had taken place at 5.30 PM on 20.10.1993, but the complaint was lodged on the next day. Hence, there was inordinate delay.

(ii) Complainant-Madhuben, Gitaben's mother, had not seen the accused, but even according to her, she had only seen the back of the accused. Hence, the Court should not have convicted the appellant-accused only on the basis of the testimony of Gitaben who is stated to be aged only 12 years and was tutored by her mother Madhuben.

8. On the other hand, Mr KC Shah, learned Additional Public Prosecutor has opposed the appeal against conviction and has supported the judgment of the learned Additional Sessions Judge.

9. The prosecution case, on the basis of the birth certificate at Exh. 31, that Gitaben was born on 26.9.1981 was not challenged before the trial Court or before this Court. Hence, there is no dispute about the fact that Gitaben was aged 12 years.

10. As regards the argument about the delay in filing the FIR, the relevant facts are that the incident in

question took place on 20.10.1993 at about 5.30 PM. At that time, the victim's mother was the only family member around because the victim's father had gone to Dholka and, therefore, it was only after the victim's father returned from Dholka that the victim's mother would go to the police station for lodging FIR. The complaint was lodged before the police at 9.00 in the morning of 21.10.1993. Gitaben was taken for medical examination alongwith police yadi at 9.45 the same morning and the panchnama of the scene of offence was also prepared at 10.30 the same morning. Hence, in view of the aforesaid facts, the learned Additional Sessions Judge rightly held that there was no inordinate delay in filing the FIR and that the time gap has been properly explained by the prosecution. We, therefore, see no infirmity in the said finding.

11. As regards the question of identification of the accused, the evidence of complainant Madhuben as well as victim Gitaben clearly revealed that the accused was from the same village and the accused was also employed for cultivating another adjoining field of the same owner Laxmanbhai whose field was being cultivated by Jayantibhai, the husband of the complainant and father of Gitaben and Gitaben and her mother were collecting grass for the cattle from one of those fields and the accused was working in the adjoining field. It is but natural that when the accused committed the offence, Gitaben was clearly able to see the face of the accused. In this view of the matter, Gitaben could easily identify the accused and complainant Madhuben could see the accused running away from the scene of offence. Hence, there is no doubt whatsoever about the identity of the person who committed the offence, viz. the accused.

12. As regards the argument that Gitaben was tutored, the learned Additional Sessions Judge has given cogent and convincing reasons for rejecting the said argument and we are in complete agreement with the same. It is but natural that when a minor girl is subjected to such serious sexual assault, her mother would accompany her while lodging the complaint, at the time of medical examination and even at the time of recording evidence before the Court. However, it does not and cannot mean that the victim was tutored by the mother.

13. In view of the aforesaid discussion, we find no merit in the appeal against conviction and the same deserves to be dismissed.

14. Coming to the question of sentence, the learned

counsel for the appellant has submitted that since the accused had pleased that he was married and had three young children, the sentence was excessive. In any case, he has submitted now that the accused is already released, the sentence may not be enhanced.

The learned Additional Public Prosecutor points out from the remarks of the Deputy Superintendent, Ahmedabad Central Jail that the accused was sentenced to seven years rigorous imprisonment, but he was granted remission of 2 years, 4 months and 4 days and, therefore, he was released on 25.6.1998. He, however, submits that the sentence awarded by the learned Additional Sessions Judge was inadequate looking to the age of the victim.

15. In the peculiar facts and circumstances of the case, when the accused was released five years ago and when the State Government itself has exercised its powers of remission under Section 432(1) Cr.PC, we are not inclined to exercise the power of enhancement at this stage. Sub-sections (1) and (2) of Section 432 Cr.PC read as under :-

"Power to suspend or remit sentences.

432.(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) to (7) ... ..."

Section 433 A Cr.PC. reads as under :-

"Restriction on powers of remission or commutation in certain cases.

433A. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

It is true that when the State Government exercises the power of remission under sub-section (1) of Section 432 Cr.PC., the State Government is not required to obtain opinion of the Court by which the order of conviction is passed or before which the appeal against conviction is pending (unlike the exercise of powers under sub-section (2) of Section 432 at the instance of an applicant, presumably the convict or his relative/friend, when the State Government will be required to obtain such opinion). It is also clear that the only statutory fetter on the exercise of power under Section 432 as provided in Section 433A.

Nonetheless, when this Court had issued notice for enhancement, the State Government and the learned Public Prosecutor ought to have invited the attention of the Court to the likely release of the accused on account of the remission which was contemplated to be granted. It may be stated that the State Government may be granting remission to the convicts on general grounds like Mahatma Gandhi Birth Centenary, but when the question is about the likelihood of the sentence being enhanced by this Court, the State Government cannot treat the proceedings for enhancement as irrelevant before taking the decision for remission of the sentence.

16. We are also of the view that it is required to be impressed upon the Registrar of this Court that in conviction appeals where this Court has issued notice for enhancement, upon the application made by the State Government under Section 377 Cr.PC or suo motu, such appeals are required to be notified for early final hearing so that the Court would be in a position to hear the appeal as well as the notice for enhancement before the date of release of the convict from jail. The Registry shall accordingly maintain a separate register of matters wherein notice is issued by the Court for enhancement of sentence, whether on an application under Section 377 Cr.PC or otherwise.

17. We make it clear that the above observations in para 15 are made in the facts and circumstances of the present case and the question of enhancement of sentence is to be considered in the facts and circumstances of each individual case and we may not be treated to have laid down any general principle that the power of enhancement cannot be exercised after the exercise of the power of remission.

18. Subject to the aforesaid observations, the appeal is dismissed and the suo motu notice for enhancement is discharged.

19. The Registrar is directed -

(a) to send a copy of this judgment to the State Government in the Home Department and the Inspector General of Prisons, particularly inviting their attention to the observations made in para 15 hereinabove.

(b) to issue appropriate instructions to the concerned department/s in the Registry for ensuring that the matters wherein notice for enhancement is issued are listed, after complying with all formalities like calling of record and proceedings and preparation of the paper book, for early final hearing in light of the observations made in para 16 hereinabove.

[D.K.TRIVEDI, J.]

[M.S.SHAH, J.]

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